



POLICE DEPARTMENT

May 12, 2009

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Timothy Schultz
Tax Registry No. 934158
73 Precinct
Disciplinary Case No. 83987/08

Police Officer Justin Caballero
Tax Registry No. 932392
73 Precinct
Disciplinary Case No. 83988/08

The above-named members of the Department appeared before me on January 15 and January 27, 2009, charged with the following:

Disciplinary Case No. 83987/08

1. Said Police Officer Timothy Schultz, assigned to the 73 Precinct, while on duty on November 11, 2006, at approximately 0030 hours, while in the vicinity of Broadway and Rockaway Avenue, Kings County, having conducted a car stop and escorted the driver, Mr. Frank Ziegler, out of his vehicle, did wrongfully use force against Mr. Ziegler, to wit: said Police Officer Schultz, while acting in concert with Police Officer Justin Caballero, Tax Registry No. 932392, 73 Precinct, struck Mr. Ziegler on the top of his head with an object that caused a laceration, without proper police necessity.
(As amended)

P.G. 203-11, Page 1, Paragraph 2 – FORCE

2. Said Police Officer Timothy Schultz, assigned as aforesaid, at time, date and location set forth in Specification No. 1, did wrongfully use force against Mr. Frank Ziegler, to wit: said Police Officer Schultz used pepper spray against Mr. Ziegler, without proper police necessity.

P.G. 203-11, Page 1, Paragraph 2 – FORCE

Disciplinary Case No. 83988/08

1. Said Police Officer Justin Caballero, assigned to the 73 Precinct, while on duty on November 11, 2006, at approximately 0030 hours, while in the vicinity of Broadway and Rockaway Avenue, Kings County, did wrongfully use force against the driver of a vehicle following a car stop, Mr. Frank Ziegler, to wit: said Police Officer Justin Caballero, while acting in concert with Police Officer Timothy Schultz, Tax Registry No. 934158, 73 Precinct, struck Mr. Ziegler on the top of his head with an object that caused a laceration, without proper police necessity. (*As amended*)

P.G. 203-11, Page 1, Paragraph 2 – FORCE

The Department was represented by Paul Gallagher, Esq., Department Advocate's Office. The Respondents were represented by Michael Martinez, Esq.

The Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 83987/08

Respondent Schultz is found Not Guilty.

Disciplinary Case No. 83988/08

Respondent Caballero is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on November 11, 2006, the Respondents were on duty, assigned to the 73 Precinct, performing patrol duties in uniform in a marked Radio Motor

Patrol car (RMP), and that shortly after midnight they stopped a 1998 Nissan Maxima being driven by Frank Ziegler, who was alone in his car.

The Department's Case

The Department called Frank Ziegler, Daniell McClain, and Dr. Vincent Tranchida as witnesses.

Frank Ziegler

Ziegler, [REDACTED] who is currently unemployed, testified that on November 10, 2006, he was working as a fire safety officer at a methadone program. After he got off of work at 3:00 p.m., he spent the evening visiting [REDACTED] in [REDACTED]. About 30 minutes after midnight, he started driving home in his Nissan Maxima, which had tinted windows. He was driving on Decatur Street when he noticed an RMP behind him turn its lights on. Ziegler turned onto Broadway, which he described as a "dark and dreary" street because an elevated subway track runs above it. He pulled over to the side of the road on the north side of the street. He explained that he did not pull over on Decatur Street because there was a car double-parked at the corner.

Ziegler testified that after he pulled over, he reached into his rear pocket to retrieve his wallet and then rolled down his window. Two police officers came over to his car. One officer came up to the driver's side of the car while the other officer approached the passenger side. The officer on the driver's side was holding a firearm.

Ziegler asked this officer, "What's the problem? I didn't do anything wrong. Here's my ID." He ordered Ziegler to get out of the car and put his hands up. Ziegler stated that he felt the gun come to his temple and felt his clothes being tugged as if the officer was trying to pull him out of the car through the window of the closed driver's door. Ziegler told the officer to wait a minute so that he could open the door. The door opened, Ziegler fell out of the car, and the officer dragged him to the rear of the vehicle. Ziegler testified that the officer slammed his face into the trunk and that when he went to turn his head to ask the officer why he was doing this, he saw the officer with a hand raised bringing a gun down toward his head. The officer struck him in the back of the head, causing him to fall to his knees. He was then kicked in the mouth and fell onto his stomach. While he was face down on his stomach, he could feel that he was being hit repeatedly in the back, neck, and head. He was not able to see how he was being hit. He testified that he was not resisting and that he put his hands behind his back, thinking that it might stop the officers from hitting him. He was "stomped repeatedly" by "more than one" officer. He went numb from being struck so many times.

Eventually, he was handcuffed. He then felt his left shoulder being tugged as if the officers were trying to pick him up from the ground. While he was in a crouched position, he was pepper sprayed in the face. When asked to describe his physical condition, Ziegler replied, "I was struck with an object, I was dazed, hurting, I couldn't see, the blood was running off my head into my eyes, and also on top of that I couldn't hardly breathe because I was maced."

The officers then picked him up, placed him in the RMP, and transported him to the 73 Precinct. Ziegler did not know at the time why he was being arrested.

He was charged with attempted assault in the third degree, reckless endangerment in the second degree, petit larceny, grand larceny in the fourth degree, obstructing governmental administration in the second degree, resisting arrest, unlawful possession of marijuana, criminal possession of marijuana in the fifth degree and reckless driving [Department's Exhibit (DX) 3]. These charges were ultimately dismissed.

Emergency Medical Services responded to the station house and transported Ziegler to Brookdale Hospital where he received nine staples to the back of his head and a sling for his sprained arm. [DX 1 consists of certified medical records from Brookdale Hospital concerning the medical treatment received by Ziegler. On one emergency department document a physician described Ziegler's head injury as a "superficial laceration" approximately three centimeters in size. A department of radiology report reads, "There is soft tissue swelling in the scalp in the front parietal region. There is no evidence of intracranial hemorrhage, mass-effect, infarct, hydrocephalus or extra-axial fluid collection. There are no skull fractures."] After receiving treatment, Ziegler was transported back to the precinct, where officers from the Internal Affairs Bureau (IAB) interviewed him. At that time, he was photographed. [DX 2 is a photograph of Ziegler's rear scalp area, taken on the day of the incident. Seven staples can be seen on his rear scalp area covering an area approximately an inch and a half in length.]

When he was asked if he could identify the officers, Ziegler replied that he could not because he never had visual contact with the officers since he was always restrained and the officers were always behind him, staying out of the clear view of his eyesight.

On cross-examination, Ziegler testified that on the night of the incident he was hanging out with a friend named Marvin Cyress at a garage where Cyress installed car

radios. There were other people present in the garage. He left the garage at about midnight. When he saw the lights on the RMP behind him flashing, he was not immediately certain that he was being directed to pull over his car. He decided to pull over, though, as soon as he made the turn onto Broadway, leaving seven to ten feet for the RMP to pull up behind him. Ziegler testified that he did not know "in what manner" the officer approached the driver's window, whether he walked or ran from the RMP to his side of the car. Although he did not recall previously stating that the officer must have run over to his car because he appeared at his window so quickly, he conceded that it was possible that he had said this. He explained that he is not certain that his recollection of this incident is entirely accurate because of disorientation he experienced due to the head trauma he sustained.

Only one of the officers pulled him out of the car. The officer used one hand to pull Ziegler by the collar and left shoulder area while he used the other hand to point the gun at Ziegler's head or eye. Ziegler was out of the car within a matter of seconds. The officer on the other side of the car was holding a flashlight, but Ziegler could not recall exactly what that other officer was doing. Together the officers dragged Ziegler to the back of the car. At the rear of the car he was struck a number of times, but he was not keeping count. More than one officer used force against him while at the back of the car.

Ziegler testified that while he was seated inside the RMP, one of the officers slapped him across the face when he wiped his face on the officer's jacket. There were two officers in the front seat of the RMP. Ziegler did not recall that anyone was in the back seat with him. According to Ziegler, the RMP had no partition between the front and back seats. He was not certain which of the officers struck him.

Ziegler's car was brought to the station house, but he did not know who drove it there. He could not see at the time because of the pepper spray in his eyes.

At the hospital, Ziegler did not receive staples or stitches anywhere on his body other than on his head. He was prescribed Motrin or some other kind of painkiller and was released from the hospital the same day.

Ziegler has filed a lawsuit regarding this incident. According to the notice of claim, which was signed by Ziegler, he is suing for \$50 million. In the notice of claim, Ziegler alleged that he was sitting at a traffic light when the officers for no apparent reason approached him and started beating him up. Ziegler testified that the encounter began when he was either at a stop sign or traffic signal, but he went on to state that he did not actually recall waiting at a traffic signal. In the lawsuit Ziegler also alleged that the officers subjected him to racist slurs. He testified that while the officers did use racist slurs as they were restraining him, the assault against him is the focus of the case.

On November 30, 2006, he was interviewed by investigators from the Civilian Complaint Review Board (CCRB). At this CCRB interview, he stated that he was struck on the head with the butt of a gun four to five times. The CCRB investigators had to get permission from Ziegler's attorney before conducting the interview. At no point during the interview did Ziegler mention that the officers had uttered racist slurs. He could not recall if he mentioned racist slurs at his IAB interview on the day of the incident or any of the follow-up conversations he had with personnel from CCRB and IAB. According to Ziegler, he has not worked since this incident and is in bad financial condition. He explained that he could not work because his injuries took time to heal and he also needed to see a psychiatrist. He alleged in the lawsuit that he suffers from terrible

nightmares as a result of the incident and that it has left him unable to fully function as a human being. He also alleged in the lawsuit that he lost control of his bowels and bladder during the course of the incident. He testified that he is not sure if he mentioned this fact to IAB on the day of the incident, but he believes he mentioned it at some point to either IAB or CCRB. He has been denied disability more than once.

Ziegler is 6'2" tall and weighed approximately 235 pounds at the time of the incident. Although he has been told that the reason that the police pulled him over was because they observed him smoking marijuana, he testified that he was not smoking marijuana that day. Although Ziegler has lived in New York all his life, the plates on his car and his driver's license were issued by the State of Virginia. He explained that he transferred his plates and license to Virginia because at one point a couple of years ago he was planning on relocating to that state. He stated that this transfer had nothing to do with the fact that auto insurance is cheaper in Virginia than in New York.

Ziegler testified that he sustained no major injury to his face when the officers slammed his face into the trunk. He stated that during the incident he was struck across the back with a wooden or metal object at least a foot long. He could not say how many times he was struck with this object. He stated that it was the initial strike with the gun that caused the gash on his head. At the time he was struck, he was facing the trunk but was turning around to face the officer. The injury to his head caused blood to run down his face and also the front and back of his head. He testified that his hands were injured when he tried to protect his head with his hands. He did not throw any punches at the officer, grab anything on the officer, or pull the shield off of the officer's shirt.

He stated that the officer was in uniform but not the regular patrol uniform with the tie.

He did not know how long the assault lasted.

He later learned that an individual named Daniell McClain observed the incident. He described McClain as someone he knew from the neighborhood, but he would not consider McClain a friend or an acquaintance. At one point, McClain told Ziegler what he saw and Ziegler confirmed to McClain that his version of the encounter was basically accurate. He has not spoken with McClain in a while.

On redirect examination, Ziegler testified that the officer who hit him with the gun was approximately 5'9" tall, but he never focused directly on him. Although he had been arrested prior to the incident, he has never been convicted of a crime. He was arrested a couple of weeks before this trial for a suspended driver's license.

On recross-examination, Ziegler testified that his father brought him a change of clothes because he defecated in the clothes he had been wearing. With regard to his arrest prior to the incident, he could not recall what he was arrested for. The charge was ultimately dismissed. [Respondent's Exhibit (RX) A is a photograph of the Respondent taken from the front. It was taken a few hours after the incident when he returned to the station house from the hospital. There is no noticeable injury to his face. His left arm is in a sling.]

Daniell McClain

McClain, who has been employed as a bus operator for the Transit Authority for the past four years, testified that when he got off work at approximately 11:50 p.m. on November 10, 2006, he drove to Brooklyn to meet a friend at a pool hall. He later

dropped his friend off at Broadway and Gates Avenue. He then drove down Broadway toward Rockaway Avenue, where another friend lived. While he was stopped at the traffic light at the intersection of Broadway and Decatur Street, he saw an RMP turn the corner and stop a car. According to McClain, three police officers got out of the RMP. The officers were wearing Police Department windbreakers and one was wearing a "biker shirt . . . with the fake badge with the reflector on the arm." When the traffic light turned green, McClain drove around the RMP and the car. When he glanced over at them as he passed by, he recognized the face of the driver who had been stopped. The driver's window was down at the time. McClain pulled his car over to the curb, and parked his car about three or four car-lengths past the RMP. He got out of his car and walked back on the sidewalk to see if he could be of assistance to the driver, whose name he did not know at the time.

McClain testified that as he approached, he saw one of the officers striking the back of Ziegler's head with the butt of a gun. Meanwhile, a second officer raised his baton above his head and brought it down on the back of Ziegler's head. The third officer pepper sprayed Ziegler. McClain identified Respondent Caballero as the officer who either struck Ziegler with the gun or who struck him with the baton. He identified Respondent Schultz as the officer who used the pepper spray.

McClain stated that when he approached Respondent Schultz, Respondent Schultz turned around in a rage, pushed him in the chest, told him to "get the F out of here," and threatened to pepper spray him if he did not leave. At that point McClain called 911, provided the RMP number to the operator, and requested that a supervisor respond to the scene. McClain observed the officers lifting Ziegler up and placing him in the back of

the RMP. McClain saw white foam and blood on Ziegler's face. One of the officers got into Ziegler's car. Both Ziegler's car and the RMP drove off in the direction of the 73 Precinct. McClain got back into his car and followed them to the station house where he saw two of the officers from the incident talking to the desk sergeant. McClain asked the sergeant about Ziegler and the sergeant replied that it was none of his business. Because he was not getting any cooperation, McClain called 911 again and he reported the incident to IAB. McClain testified that he has never been convicted of a crime.

On cross-examination, McClain acknowledged that he told the 911 operator that he and Ziegler were friends. He conceded that he did not know Ziegler's name at the time of this incident. Between 1995 and 2001, they were members of the same car club and saw each other every other week or so but they had not seen each other for about a year. McClain stated that the RMP had its lights and sirens on only after it turned onto Broadway. McClain testified that the three officers walked slowly from the RMP towards Ziegler's car. At that point, he did not see any weapons in their hands.

McClain did not see how Ziegler exited his car. When McClain walked over to where the officers and Ziegler were, Ziegler was standing next to the passenger side of the RMP. At no point did he see Ziegler standing next to the trunk of his own car.

He testified that Zeigler was hit on the head once with a gun handle and twice with a baton. He was then confronted with a statement he made to a CCRB investigator, at his interview on December 6, 2006, in which he said that Zeigler was struck on the head two or three times with a gun and four times with a baton.

He only saw Respondent Schultz use mace, he never saw him strike Ziegler with anything. He saw Ziegler trying to block the blows with his hands. McClain did not

know exactly when the officers handcuffed Ziegler because his verbal exchange with Respondent Schultz distracted him from what was going on with Ziegler. The incident with Ziegler lasted a minute or two. Respondent Schultz and one of the other officers were in the RMP with Ziegler. He could not recall when he next saw Ziegler after the incident. He does not know anything about Ziegler's lawsuit.

On redirect examination, McClain testified that he had to take a vision test to become a bus driver and that his vision is good. Streetlights were on during the incident and he described the lighting conditions at the time as not bright but not dark either. McClain could not recall whether Ziegler was handcuffed when he was pepper sprayed.

Dr. Vincent Tranchida

Dr. Tranchida is currently employed as a senior medical examiner with the Office of the Chief Medical Examiner of the City of New York. He specializes in pathology with a subspecialty in forensic pathology. Although his primary job responsibility is to determine the cause and manner of death in cases where somebody has passed away, he is occasionally called on to look at the injuries and illnesses of living patients. He has been deemed an expert witness in court with regard to deceased patients approximately 20 times and with regard to living consultations approximately four times. He has never been denied expert witness status. Based on his qualifications, Tranchida was deemed an expert witness in forensic pathology [DX 4 is a copy of Tranchida's curriculum vitae].

On November 8, 2007, Tranchida received a request from a CCRB investigator to conduct a "living consultation" to determine whether Ziegler's version or the

Respondents' version of this incident was most consistent with the injuries sustained by Ziegler. The investigator gave Tranchida the statements provided by Ziegler, McClain, and both Respondents. The investigator also gave him Ziegler's medical records, descriptions of guns, and photographs of guns and Ziegler's injuries. Tranchida documented the results of his consultation in a written report. He testified that in his medical opinion the laceration on Ziegler's head was caused by an impact against a blunt surface or blunt object. He was unable to determine what specific kind of blunt object or hard surface caused the laceration on Ziegler's head. According to Tranchida, the laceration was consistent with Ziegler's claim that he was struck while bent over a car and while on the ground, McClain's claim that Ziegler was struck while standing, and also Respondent Schultz' claim that the injury could have been sustained when Ziegler was tackled to the pavement by Respondent Caballero. Tranchida concluded that the injuries were not consistent with Respondent Schultz' testimony that they may have been sustained in a face-to-face standing struggle during which he (Respondent Schultz) struck Ziegler with his expandable baton (ASP). Tranchida explained that because Respondent Schultz is right-handed, he would be expected to injure Ziegler's left side in a face-to-face standing struggle. The laceration to Ziegler's scalp, however, was on the right side of the rear scalp. However, Tranchida further explained that if Ziegler had been crouching down at the time he was struck, it would have been possible for Respondent Schultz to reach over Ziegler and strike the right side.

On cross-examination, Tranchida testified that it took him a week or so to review the materials and write his two-and-a-half page report. Besides the scalp laceration, Ziegler sustained no other injury to his head. Tranchida stated that this injury was

consistent with blunt force trauma caused by an object. Tranchida agreed that the laceration could have been caused by a blow from the butt of a gun or an ASP or by Ziegler's head hitting a hard surface, such as concrete. The medical records do not indicate more than one impact to his head. When asked if the injuries would have been different had Ziegler been hit multiple times with the butt of a gun and an ASP, Tranchida replied that it would depend on the angle of impact and amount of force applied. Lacerations in the back of the scalp are often seen in people who fall backwards. Tranchida was never trained to use an ASP and has not observed the ASP training that police officers receive.

On redirect examination, Tranchida testified that it was possible Ziegler had minor cuts and bruises on his hands that were not serious enough to be documented in the medical records by the emergency room doctor. Tranchida never personally performed a physical examination of Ziegler.

The Respondents' Case

The Respondents called Lieutenant John Ahern as a witness and testified in their own behalf.

Lieutenant John Ahern

Ahern, a 19-year member of the Department currently assigned to IAB, investigated Ziegler's allegations against the Respondents. He testified that as part of his investigation, the firearms that the Respondents had on patrol on the day of the incident were sent to the crime scene lab for hemident testing for the presence of blood.

This testing produced negative results. He ascertained that the Respondents wore regular uniforms on the day of the incident and that the shirt that Respondent Schultz wore that day was torn on the left breast area where the shield is usually placed. [RX B is a photograph of the shirt taken on the day of the incident.] Ahern determined that the Respondents were the only members of the service present at the time of the incident. Other officers may have arrived at the scene after the encounter was over. Ahern also reviewed CCRB's investigation of Ziegler's allegations. He ultimately recommended that the case against the Respondents be closed as unsubstantiated.

On cross-examination, Ahern testified that he was not assigned to the case until after the initial investigatory steps had already been taken. Only the Respondents' firearms, not their ASPs or other blunt objects they were carrying, underwent hemident testing. IAB's determination that Ziegler's allegations were unsubstantiated meant that there was insufficient evidence to clearly prove that misconduct occurred. Although the investigation concluded that Ziegler's injury occurred during the course of the car stop that was initiated by the Respondents, a clear answer of exactly how the injury occurred could not be determined. The case was not closed as exonerated or unfounded.

Respondent Police Officer Timothy Schultz

Respondent Schultz, a five-year member of the Department who is currently assigned to the 73 Precinct, testified that on November 11, 2006, he was RMP operator and Respondent Caballero was the recorder. He testified that he pulled Ziegler's car over after he observed Ziegler driving so recklessly that he almost struck a pedestrian.

Respondent Schultz followed behind Ziegler until the car stopped at a traffic light and then drove up beside him. Ziegler's car windows were open and Respondent Schultz observed Ziegler smoking a marijuana cigarette. When the traffic light turned green and Ziegler started to drive away, Respondent Schultz activated the RMP's lights. After several blocks, Ziegler finally pulled his car over to the side of the road. During the pursuit, Ziegler kept speeding up and swerving in and out of traffic. Respondent Schultz activated the RMP's siren several times during that period. When Ziegler finally pulled over, the Respondents exited their RMP. Respondent Schultz approached Ziegler. When he asked Ziegler to step out of the car, Ziegler initially responded in a belligerent manner but then complied with Respondent Schultz' instruction that he walk to the rear of his car.

At the rear of the car, Respondent Schultz told Ziegler to put his hands on the trunk and informed him that he was under arrest. Respondent Schultz testified that he arrested Ziegler for reckless endangerment and smoking marijuana in public. At that time, Respondent Caballero was recovering the marijuana inside the car. When Respondent Schultz went to grab Ziegler's arm to handcuff him, Ziegler turned and said, "Fuck you." Ziegler also told him, "You ain't shit without this," as he ripped Respondent Schultz' shield from his shirt. Ziegler then started throwing punches with both arms. Respondent Schultz was struck mainly on the arms. He retreated backwards to remove his ASP from his gunbelt. As Ziegler continued to punch at him, Respondent Schultz swung back at him with his ASP.

Respondent Schultz recalled that when he received ASP training at the Police Academy, he was taught to swing the ASP in an X-pattern. He explained that since he is right-handed, he swung across Ziegler's body from right to left but then did a backhanded

swing across Ziegler from left to right. He executed this X-motion on Ziegler two or three times. He was not certain exactly where on Ziegler's body he made contact, but it did not stop Ziegler from moving toward him. Ziegler charged forward with his head down and knocked Respondent Schultz to the ground. Respondent Schultz explained that Ziegler was bigger and able to overpower him. The ASP flew out of Respondent Schultz' hand and he was discombobulated for a second or two. When he looked up he saw Respondent Caballero tackling Ziegler's legs, causing him to fly backward to the ground. Respondent Caballero and Ziegler engaged in a violent struggle during which Ziegler waved his hands around in an attempt to extricate himself from the situation. Ziegler was approximately a hundred pounds heavier than Respondent Caballero. Respondent Schultz testified that he then pepper sprayed Ziegler once or twice in the face. Ziegler continued to violently struggle for a minute or so until the Respondents were able to handcuff him.

When Ziegler was brought to his feet Respondent Schultz saw that he was bleeding and had a cut on his head. Although the cut occurred during the incident, Respondent Schultz did not know exactly how it occurred. Ziegler was placed in the RMP, which had a partition between the front and back seats. Neither Respondent struck Ziegler while in the RMP. Respondent Schultz drove Ziegler to the station house while Respondent Caballero drove Ziegler's car. Respondent Schultz testified that no other member of the service came to the scene. He explained that he was too engaged with Ziegler to request backup on the radio and he did not request the response of a supervisor because bystanders had begun to gather and he wanted to get away from the location as quickly as possible.

At the station house, the desk officer noted the injury to Ziegler's head. Ziegler was transported to the hospital.

Respondent Schultz testified that McClain did not approach him during the encounter with Ziegler and he never saw McClain prior to this trial. He testified that at no point during the incident did he slam Ziegler's head into the car trunk, remove his firearm from its holster, or see Respondent Caballero unholster his firearm or strike Ziegler with an ASP. Respondent Schultz also denied hitting Ziegler in the back of the head with a gun, using racial epithets, or using any force against Ziegler after he was in handcuffs. He stated that he struck Ziegler with the ASP to overcome Ziegler's assault, and he pepper sprayed Ziegler because Ziegler was resisting arrest and assaulting Respondent Caballero.

On cross-examination, Respondent Schultz testified that his gun was not drawn as he approached Ziegler's vehicle. Ziegler exited the car and walked to the rear on his own volition. According to Respondent Schultz, Ziegler exhibited signs of intoxication. His eyes were glassy and he had an odor of alcohol. Respondent Schultz is approximately 5'10" tall and weighed 200 pounds at the time of the incident. He estimated that Ziegler weighed about 250 pounds. When Ziegler was striking him, Respondent Schultz did not fear for his life but he thought he might get injured. Respondent Schultz and Ziegler were facing each other as Respondent Schultz struck him with the ASP. Respondent Schultz had been trained not to strike a perpetrator's head with an ASP because it could kill. Although Respondent Schultz does not recall striking Ziegler on the head, it is possible that it happened since Ziegler's head was lowered. The blows to Ziegler did not cause him to fall to the ground.

When Respondent Caballero tackled Ziegler to the ground, Ziegler fell on his back and Respondent Caballero jumped on top of him. Respondent Caballero was trying to get control of Ziegler's hands so that he could handcuff him. Respondent Caballero was not striking Ziegler and did not have anything in his hand. Respondent Schultz was the arresting officer. He testified that Ziegler was not charged with driving under the influence of alcohol because he did not believe there was enough evidence to support that charge. On redirect examination, Respondent Schultz testified that a marijuana cigarette that was retrieved from the ashtray of Ziegler's car by Respondent Caballero was vouchered as evidence.

Respondent Police Officer Justin Caballero

Respondent Caballero, a five year member of the Department who is currently assigned to the 73 Precinct, testified that after he observed Ziegler driving fast and swerving on both sides of the road, the RMP lights and sirens were turned on. Ziegler continued to drive for approximately six blocks before he pulled his car over. When Ziegler came to a stop, the Respondents approached his vehicle and Respondent Caballero noticed the smell of marijuana. He also observed a still-lit marijuana cigarette in the ashtray. While Respondent Schultz walked to the back of the car with Ziegler, Respondent Caballero went inside the car to recover the marijuana. While he was still inside the car, he heard Respondent Schultz and Ziegler fighting outside. When he stepped out of the car he observed Ziegler throw six or seven punches at Respondent Schultz' upper body and face area. Respondent Schultz took a step back, pulled out his ASP, and swung it in X-like motions at Ziegler. The X-like motion is how officers are

trained to use the ASP in the Police Academy. Respondent Caballero did not see where the ASP made contact with Ziegler. Ziegler charged at Respondent Schultz, grabbing him by the upper torso and knocking him down to the ground. The ASP fell out of Respondent Schultz' hand. Respondent Caballero then charged at Ziegler, grabbing him around the waist and pulling him down to the ground.

Respondent Caballero is 5'7" inches tall and weighed approximately 150 pounds at the time of the incident. He perceived that Ziegler weighed 250 or 260 pounds. While on the ground, Ziegler resisted as Respondent Caballero attempted to grab his hands. Only after Respondent Schultz provided assistance were the Respondents able to successfully handcuff Ziegler. Respondent Caballero did not recall Respondent Schultz pepper spraying Ziegler. Respondent Caballero testified that at no point during the incident did he use a weapon against Ziegler, take his gun out, or observe Respondent Schultz unholster his firearm. Respondent Caballero testified that neither Respondent used any force against Ziegler after he was handcuffed. He stated that he used force against Ziegler because he saw Respondent Schultz being assaulted and he feared for his partner's safety. He also feared that Ziegler might grab Respondent Schultz' holstered firearm.

As the Respondents placed Ziegler in their RMP, Respondent Caballero noticed that Ziegler had blood on his head. He did not know exactly how Ziegler became injured, but it could have occurred during their struggle. Respondent Caballero did not specifically see Respondent Schultz strike Ziegler in the head with the ASP, but that could have been another cause of the injury. The RMP had a partition between the front and back seats.

After Ziegler was already seated in the RMP, another Department vehicle drove by the location. No one in that vehicle ever got out. Respondent Caballero testified that there were civilians in the area, but he did not have any contact with them. He did not recall seeing McClain. Respondent Schultz drove the RMP back to the station house and Respondent Caballero followed in Ziegler's car. After presenting Ziegler to the desk officer, Respondent Caballero escorted him to the hospital. According to Respondent Caballero, Ziegler exhibited signs of intoxication, namely glassy eyes and an odor of alcohol.

On cross-examination, Respondent Caballero testified that he observed Ziegler driving recklessly, but he did not know at the time that Respondent Schultz had observed Ziegler smoking marijuana. Ziegler was at first compliant. Respondent Caballero stated that when he grabbed Ziegler around the waist he was trying to subdue him and place him in handcuffs. They fell to the ground together because Ziegler was still moving his arms and resisting arrest, causing them to trip. Ziegler fell to the ground on his back/side region. Respondent Caballero did not notice any bleeding from Ziegler at that point. They struggled on the ground for a couple of minutes before Respondent Caballero was able to handcuff Ziegler. At no point did he hit Ziegler in the head with any object. As far as he knows his ASP was never tested at the lab. He found out later that Respondent Schultz had discharged his pepper spray.

FINDINGS AND ANALYSIS

It is charged that the Respondents, acting in concert and without proper police necessity, struck Ziegler on the top of his head with an object that caused a laceration. It

is further charged that Respondent Schultz wrongfully used force in that he used pepper spray against Ziegler without proper police necessity.

The Respondents acknowledged that they used force against Ziegler (Respondent Schultz swung at Ziegler with his ASP, that he sprayed pepper spray at him and Respondent Caballero grabbed him and tackled him onto the pavement). However, the Respondents argued that their use of force was not wrongful or without proper police necessity because this force was used only in response to Ziegler's action of throwing punches with both arms at Respondent Schultz while he was attempting to arrest him.

Ziegler asserted that even though he did not physically resist the officers,¹ he was savagely assaulted by having his face "slammed" into the back of the trunk of his car, being struck on the head with a gun repeatedly and "stomped" repeatedly. The credibility of Ziegler's assertions must be examined in light of the following factors: The fact that his claim regarding how many times he was struck on the head, was not unequivocally supported by the expert testimony of Dr. Tranchida; his admission that the verification he signed regarding his civil suit contains a factual statement which is untrue; the fact that, although he has been interviewed a number of times about this incident, at this trial he alleged for the first time that the Respondents had directed racial slurs at him; and Ziegler's admission that he had obtained a driver's license and car registration from Virginia, a state he has never resided in.

Dr. Tranchida testified that he reviewed Ziegler's medical records and the photographs of Ziegler taken by IAB when he returned to the precinct from the hospital.

¹ Although Ziegler could not identify the Respondents as the officers who stopped his car, the Respondents acknowledged that they were the officers who stopped his car and who used force against him.

At his CCRB interview, Ziegler stated that he was struck on the head with a gun four to five times. However, Dr. Tranchida stated that, in his expert opinion, the laceration on Ziegler's scalp did not indicate more than a single impact to his head. (Transcript, p. 209) Since Dr. Tranchida also testified that the medical records and the photographs of Ziegler do not depict any injury to the front of his face, they do not support his claim that he was slammed face first into the closed trunk of his car.

The verification Ziegler read and signed regarding his civil suit states that at the point when the Respondents approached his car, his car was stopped in a traffic lane because he was waiting for the traffic signal to change so that he could drive on. Ziegler admitted that, although his attorney prepared this verification based on information provided by Ziegler, this factual representation in his verification was false and that the truth was that he had stopped his car by pulling over to the side of the road because he saw the flashing lights of the RMP behind him, not because he was waiting for a traffic light to change to green.

Also, although in his trial testimony Ziegler stated that the Respondents had directed racial slurs at him during this incident, he did not tell this to the investigators from the Internal Affairs Bureau who interviewed him on the night of this incident, nor did he mention this at his CCRB interview. The fact that he omitted this allegation in his prior statements engenders the suspicion that Ziegler falsely embellished his trial testimony by inventing a new allegation of misconduct, one that would create a motive for the Respondents' alleged assault on him.

Finally, Ziegler acknowledged that although he is a lifetime resident of New York, he obtained a driver's license from Virginia and he registered his car in Virginia as if he were a resident of that state. Ziegler's assertion that he did not do this to obtain a lower auto insurance premium but because he genuinely "planned" to move to Virginia, is belied by the fact that he never actually moved there, even temporarily, and by the fact that although he obtained his Virginia plates and license "a couple of years ago," he never reapplied to the Department of Motor Vehicles to reissue him a New York driver's license and he never re-registered his car in New York.

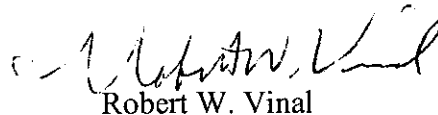
Since McClain testified that he did not see what occurred between the point when he drove by and saw Ziegler seated in the driver's seat of his car to the point when he next observed Ziegler standing next to the passenger side of the RMP, and that he never saw Ziegler standing behind the trunk of his own car, McClain's testimony does not corroborate Ziegler's claim that he was slammed down onto the trunk of his car nor does McClain's testimony serve to refute Respondent Shultz' testimony that Ziegler started throwing punches at him while they were at the rear of Ziegler's car. Thus, the only evidence presented by the Department regarding the interaction that occurred between Ziegler and the Respondents at the rear of Ziegler's car was the testimony of Ziegler himself and, based on the foregoing, I cannot credit Ziegler's version of this event.

McClain's testimony that he saw an officer strike Ziegler once on the head with the handle of a gun does not establish that either of the Respondents did this because McClain claimed that there were three officers present and that one held only a gun, one held only a mace can and the third held only a baton. Moreover, he corroborated

Respondent Shultz' testimony that he was holding the mace can and McClain testified that he was unsure as to whether Respondent Caballero held a baton or a gun in his hand.

Based on the above, I find that the Department did not meet its burden of presenting believable testimony which proves these charges by a preponderance of the credible evidence. I recommend that the Respondents be found Not Guilty.

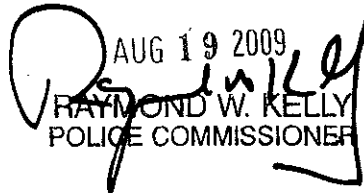
Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner - Trials

APPROVED



AUG 19 2009
RAYMOND W. KELLY
POLICE COMMISSIONER